United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-2066

To be argued by
DOUGLAS S. EAKELEY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-2066

UNITED STATES ex rel. FRANCISCO MARTINEZ, a/k/a TONY CRUZ,

Petitioner-Appellant,

- against-

WARDEN JAMES A. THOMAS,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

This is an appeal by Petitioner-Appellant, Francisco Martinez ("Martinez"), from a final order entered on April 4, 1975 by the United States District Court for the Southern District of New York, denying Martinez' petition for a writ of habeas corpus, following a two-day evidentiary hearing held on December 10 and 11, 1974 before the Honorable Harold R. Tyler, Jr., United States District Judge.

Martinez was convicted on August 12, 1966, after a trial by jury in the Supreme Court of the State of New York, New York County, of attempted robbery in the first degree, attempted grand larceny in the first degree, assault in the second degree and possession of a dangerous weapon as a felony. He was sentenced on October 4, 1966 by the Hon. Abraham J. Gellinoff to serve 7 1/2 to 15 years' imprisonment on these various charges. Paroled in 1972, Martinez was rearrested several months thereafter. His original sentence was reinstated, which he is currently serving and from which he now seeks relief.

Although the Legal Aid Society filed a notice of appeal from Martinez' judgment of conviction on October 4, 1966, he never received the notice, and the Legal Aid Society did not prosecute his appeal. The appeal was finally dismissed as abandoned on April 15, 1968, at a time when Martinez was confined to Dannemora State Hospital as suffering from psychosis with psychopathic personality, schizoid type. Nevertheless, as the District Court found, Martinez exhausted his available state remedies through subsequent applications for a writ of error coram nobis in the Supreme Court, New York County, which applications were denied.

Martinez filed the instant pro se petition on January 10, 1974, alleging that his 1966 conviction violated his rights

under the Sixth and Fourteenth Amendments to the Constitution of the United States in that, inter alia: (a) he was deprived of his right to counsel of his own choosing; (b) the trial court arbitrarily refused his request for an extension of time in which to retain private counsel, and directed that he proceed either to represent himself or to accept the assistance of assigned counsel who was unprepared for trial; (c) he was mentally incompetent to waive his right to counsel and to represent himself; and (d) the trial court failed to make diligent inquiry concerning his competency at any time in the course of the trial or at the sentencing hearing.

Pursuant to 28 U.S.C. §636(b)(3), Judge Tyler referred Martinez' petition to the Hon. Gerald L. Goettel, United States Magistrate, who submitted on June 27, 1974 a Report and Recommendation on Habeas Corpus. In his Report, Magistrate Goettel determined that the Court need not accord the findings of the coram nobis court the presumption of correctness provided by 28 U.S.C. § 2254(d), and that Martinez was constitutionally entitled to an evidentiary hearing on the issues raised by his petition. Judge Tyler confirmed the findings and conclusions of Magistrate Goettel in a memorandum dated July 23, 1974, and ordered that an evidentiary hearing be held as soon as practicable. The undersigned was appointed to represent Martinez, who had previously been granted leave

to proceed in forma pauperis, and a hearing was held on December 10 and 11, 1974.

Upon the entry on April 4, 1975 of Judge Tyler's Opinion and Order denying Martinez' petition, the undersigned moved on Martinez' behalf for a certificate of probable cause for an appeal and for leave to proceed therewith in forma pauperis. This motion was granted by the Hon. Dudley B. Bonsal, United States District Judge, on April 16, 1975, and a Notice of Appeal was filed the next day. On April 24, 1975 by order of the Hon. Wilfred Feinberg, United States Circuit Judge, the undersigned was appointed under the Criminal Justice Act as counsel for Martinez on appeal.

ISSUED PRESENTED

1. Did the District Court err in its holding that Martinez waived counsel and was competent to do so and to represent himself at his trial in 1966?

2. Did the District Court err in refusing to hold that Martinez' behavior at trial, his Pre-Sentence Report, and the request by Martinez and two counsel that he be examined prior to the imposition of sentence, created a "reasonable doubt" as to his competence to represent himself?

3. Did the District Court err in concluding that the trial court's failure to make any inquiry into Martinez'

reasons for representing himself or his capacity to do so (after his assigned counsel announced that he was unprepared for trial and that the case had been marked ready by mistake) did not violate Martinez' constitutional rights under the Sixth and Fourteenth Amendments?

4. Did the District Court err in holding that the trial court's refusal either to grant Martinez an extension of time in which to obtain private counsel, or later to permit private counsel to enter the case before the presentation of Martinez' defense, was not an abuse of discretion?

STATEMENT OF FACTS*

A. Pretrial and Trial Proceedings

Martinez was arrested on February 15, 1966, more than six weeks after the date of the offenses which he allegedly committed. [Stip. at 1].

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* Where possible, citations to the record on appeal conform to the abbreviations utilized by the District Court in its Opinion. "TT" indicates the transcript of the trial before Gellinoff, J. in 1966; "CNT" indicates the transcript of the coram nobis hearing before Martinis, J.; "FHT" indicates the transcript of the federal hearing before Tyler, J. The trial transcript and coram nobis hearing transcript constitute Petitioner's Exhibits 1 and 2, respectively, at the federal hearing. In addition, counsel prior to the hearing executed a Stipulation of Facts, which was marked "Court's Exhibit A" and is indicated by "Pet. Ex." followed by the appropriate number. These Exhibits are included in the Supplemental Record on Appeal. The Opinion of the District Court is referred to as "Op.", and Martinez' Appendix on Appeal is cited as "Pet. App."

An indictment, No. 999 of 1966, was subsequently filed on March 4, 1966, and Martinez was arraigned in the Supreme Court, New York County two weeks thereafter. At his arraignment he was represented by retained counsel named Stephen Gottlieb. Mr. Gottlieb was relieved by the Court from representing Martinez on April 1, upon Martinez' request, after Gottlieb had incorrectly advised him that his appeal in an earlier case had been surrendered. Mr. Gottlieb's representation of Martinez was confined to several attempts at obtaining reduced bail on his behalf. [FHT at 144-6].

Two calendar calls were held in Martinez' case during the month of April, but Martinez was not produced, nor did any counsel make an appearance. [Stip. at 1-2]. On May 5, 1966 a second lawyer appeared on behalf of Martinez, retained by his mother through a bail bondsman. [FHT at 144]. This lawyer, Faustino L. Garcia, requested at that time an adjournment of the proceedings because of his asserted inability to contact Martinez' family. In the same conference, after Mr. Garcia refused to make another application for a reduction in bail, Martinez made the application himself, which was denied. [Stip.at 2; Pet. Ex. 4(f)]. Two weeks later, Martinez requested that Mr. Garcia be relieved from representing him, because he felt that Mr. Garcia had failed

to represent his interests and had charged his mother an excessive fee. [FHT at 146-9].

On May 19, 1966 the Court appointed the Legal Aid Society to represent Martinez. Edward Leopold of the Legal Aid Society was present at that time, and later conferred with Martinez on May 24, 1966. [Pet. Ex. 4(g); FHT at 16]. In the course of their preliminary interview, Martinez apparently told Leopold that he had alibi witnesses, but refused to provide their names. [Op. at 9; Pet. Ex. 5]. Martinez did not see Mr. Leopold again until August 3, 1966, on the eve of his trial [FHT at 19-20, 150]. At that time, Martinez gave Leopold the first names of the witnesses and requested that Leopold contact his sister to help locate them, since he did not know their last names. [FHT at 151].

On June 14, 1966, Martinez was transferred to the House of Detention for Men at Rikers Island, to commence service of a prior one year's sentence. [Stip. at 2]. While there, he made several efforts through his mother to locate and retain private counsel. His mother, however, did not have a telephone in her apartment and could not speak very much English. [FHT at 154]. In addition, visitation rights for prisoners at Rikers Island were severely restricted, and Martinez did not have access to a telephone to contact a lawyer directly. [FHT at 193-3].

Calendar calls continued to be held in Martinez' case in the Supreme Court, New York County on at least two occasions, June 16 and June 20, 1966. As the District Court concluded in this regard, however, "communications within the Legal Aid Society appear to have broken down." [Op. at 10]. On neither occasion does it appear that Martinez was produced by the correctional authorities, although a Dorothy Cropper of the Legal Aid Society was present on his behalf and at the latter conference consented to the fixing of a trial date for July 5, 1966 [Pet. Ex. 4(h) and (i)], although Mr. Leopold was the attorney in charge of the case [FHT at 14-15].

On the appointed day, however, neither Martinez nor counsel from Legal Aid appeared. There followed what can at best be described as a case of bureaucratic confusion: the Court clerk erroneously announced that Stephen Gottlieb represented Martinez, although Mr. Gottlieb had been relieved on April 1, 1966. The Court then inquired of the Assistant District Attorney whether he had spoken with Martinez' counsel; the Assistant District Attorney replied that he had, that the case was to have been ready for trial that day, and that counsel for Martinez had told him that the defense was also ready. Thereupon the case was marked ready and sent to Trial Term, Part 33. [Stip. at 2-3]. In fact, however, Mr. Leopold

was on vacation and the Legal Aid Society had not yet completed its investigation.[FHT at 25-26; 32-33].

Martinez' case was called again for trial on July 7. At that time, he was produced by the correctional authorities. Grace Selwyn, another lawyer for the Legal Aid Society, answered the call, and said that she did not have Martinez' files and that she did not have his case on her calendar. The case was marked ready and passed. It was called again the following day, whereupon Ms. Selwyn reported to the Court that Mr. Leopold was the attorney in charge, that he was on vacation, and that Martinez' case was not ready and should never have been transferred to the certified ready calendar in Trial Term. [Pet. Ex. 4(k) and (l)].

On August 3, 1966, having just returned from vacation, Mr. Leopold appeared before Brust, J. to request an adjournment of the case. After a rather heated colloquy, at which Martinez was present, Justice Brust denied the request for adjournment and set Martinez' case for trial on the following day, Mr. Leopold's protestations notwithstanding. [Pet. Ex. 4(m); FHT at 25-26]. This was the first notice Martinez had that he would be going to trial on August 4, 1966. [FHT at 152].

On the morning of August 4, 1966, looking extremely upset, agitated, and frustrated, Martinez informed

Mr. Leopold that he no longer wished to continue his representation. [FHT at 28]. He came to this decision because he felt that Mr. Leopold was unprepared, was not concerned with his case, and had not made enough efforts to obtain an adjournment. [FHT at 152-3, 184].

This was the posture of the case when it reached Justice Gellinoff for the first time on August 4, 1966. Mr. Leopold renewed his application for an adjournment, based on his lack of preparation, and informed the Court that Martinez no longer desired his representation. In response, Justice Gellinoff indicated that he might, in the event it later became necessary, give Mr. Leopold "a reasonable adjournment for a day or two", but that he was not about to postpone the commencement of the trial. [TT at 4-5]. Justice Gellinoff also made very clear by the following exchange that he regarded Martinez' desire to discharge Mr. Leopold as a delaying tactic:

> "THE COURT: . . . You know you're dealing, Mr. Martinez, you're dealing with experienced people. You see you stay there in your cell or in your cubby or in your room and you try to scheme out ways of beating the case. You try to scheme out ways of getting delays for different things.
>
> THE DEFENDANT: I have nothing to do with this. That's why--
>
> THE COURT: Wait, listen. But I want you to know that you're dealing with experts here in the court. They're all experts. With you it's just one case. We handle thousands of such cases.

THE DEFENDANT: Because mine is one doesn't mean nothing, right.

THE COURT: No, what I'm trying to bring out is that we recognize the difference. Now, you can't get away with coming in here right now and saying you don't want your lawyer. Now, stop talking. You won't get away with it. You are ordered to go to trial.

THE DEFENDANT: I don't want him as my lawyer.

THE COURT: It doesn't make any difference. You are going to trial with him as your lawyer.

THE DEFENDANT: I don't want him as my lawyer. That's a fact.

THE COURT: Call a jury." [TT at 5-6].

Mr. Leopold attempted to explain to the Court that he was unprepared to go to trial that day, and that the case had been transferred by mistake to the ready trial part. To this the Court replied in pertinent part:

"THE COURT: Mr. Leopold, I am not going to rehash what's happened. We have a system here. We're trying to clear the calendars. . . ." [TT at 8].

The Court thereupon directed that Mr. Leopold represent Martinez. [TT at 9].

Shortly thereafter, Martinez himself requested an adjournment for a week or so, to locate his witnesses and to obtain the services of private counsel through his mother. [TT at 10]. When it became apparent he could not obtain an adjournment, Martinez announced that he would represent himself:

"THE DEFENDANT: I'm not trying to avoid going to trial.

THE COURT: I know. That's what it looks like, you see. Now, I cannot recognize it. I'm the kind of a fellow who'd like to give you every conceivable break imaginable and I do whatever I can, but I still have a job to do. After all, I've got to uphold the law. I've got to do my job. This case was set for today. My whole calendar was cleared. If I don't try this case, I have to go and cut out paper dolls, twiddle my thumbs. I've got nothing to do.

THE DEFENDANT: All I ask is for a week or two, Your Honor, so I could have my lawyer in and I could have my witnesses in.

THE COURT: My friend, listen to me. It's just too late to make that request.

THE DEFENDANT: In that case, I'd like to represent my own self.

THE COURT: If you want to represent yourself, its perfectly agreeable to me. . . ." [TT at 11-12].

At no time in the course of any of these preliminary exchanges did Justice Gellinoff inquire into the reasons why counsel for Martinez was unprepared, or the extent of the investigation conducted to that date by the Legal Aid Society. Justice Gellinoff in fact had no information on the case before him with respect to this matter, but "just assumed" that the Legal Aid Society had done its regular complete investigation. [FHT at 99-106]. As it turns out, the Legal Aid Society had not conducted any investigation beyond its preliminary interview and search in

May, 1966; nor had any lawyer or investigator interviewed Martinez other than the two occasions of May 24, 1966 and August 3, 1966 when Mr. Leopold appeared in court with him. [FHT at 19-20; 150-51]. Nor did Justice Gellinoff inquire as to the reasons for the various adjournments and calendar calls which appeared on the Docket Sheet which was before him on the day of trial. [FHT at 102-03]. Most significantly, Justice Gellinoff made no attempt to ascertain whether Martinez understood the consequences of his decision to represent himself, and was competent to waive his right to counsel.

Although Martinez proceeded to represent himself at the trial, he made it very clear throughout that he was doing so only because he did not wish Mr. Leopold to represent him. At virtually every turn, he renewed his request for an adjournment, so that he could contact his mother and, through her, obtain the services of a private lawyer. [See, e.g., TT at 40, 43, 116-17, 120, 135, 142, 144]. On the second day of trial, Mr. Leopold reported to the Court that he had been unable to locate Martinez' mother, but that he had contacted his sister, who stated that their mother was ill. [TT at 41]. Later that day, Martinez requested that the Court issue a pass to Rikers Island to his mother, so that he could confer with her;

this request was denied, the Court ruling that his mother must personally appear to obtain the pass, and that it would not grant a pass over the weekend. [TT at 58-59].

In the meantime, the trial proceeded. Not until the fourth day of trial, on August 9, 1966, did Mr. Leopold report success in contacting Martinez' mother, who informed him that she had on the previous day given money to a lawyer to represent her son. [TT at 129]. When that lawyer did not appear in court, Justice Gellinoff finally directed that it be arranged for Martinez to contact his mother from Rikers Island directly, via a telephone call to his sister who lived next door. [TT at 142; FHT at 154]. The following day Martinez reported to the Court that he had spoken with his mother, and that the lawyer she had retained had another case pending during that morning. He therefore asked again for an adjournment, since he was about to present his defense. The following exchange ensued:

> "THE COURT: Mr. Martinez, I cannot adjourn it for any lawyer or anybody else. You must proceed.
>
> THE DEFENDANT: But I need this lawyer, Your Honor.
>
> THE COURT: Mr. Martinez, will you listen. I'm making a ruling. I cannot argue this more. There's no further opportunity for argument.

The case is on trial. You are now ready to call your witnesses for the defense. You have four witnesses available. You have the police officer. You have the detective. You have Mr. Rasulo--was it three or four?

MR. McGINLEY: Washington, Your Honor.

THE COURT: And Washington. They're all here ready to be called.

THE DEFENDANT: My mother told me this morning she'd have a lawyer.

THE COURT: I'm not interested in your having a lawyer other than the lawyer now sitting alongside of you.

THE DEFENDANT: But he's not my lawyer. I need my own lawyer.

THE COURT: Mr. Martinez, kindly proceed witn your defense. Call your next witness. If you won't call them, I'll call them. Who do you want to call first?

THE DEFENDANT: I need my lawyer over here. I'm making a fool of myself in this courtroom, and you know it.

THE COURT: Mr. Martinez, please stop talking about a lawyer.

THE DEFENDANT: I don't know nothing about law, Your Honor, and you know this. I need my own lawyer before we finish this case. I've been trying to get one before we started the case.

THE COURT: Now, stop talking about a lawyer, and answer my questions. Which of these four witnesses do you want called first? They are all here.

THE DEFENDANT: I refuse to say anything, Your Honor.

THE COURT: You refuse to say anything? All right, bring in the first one, Mr. Washington.

THE DEFENDANT: He doesn't give me a chance to get my lawyer. He's forcing me to go to trial.

DEFENDANT'S MOTHER: Could I say something?

THE COURT: Please sit down.

(The jury enters the courtroom.)"

[TT at 145-46].

Although Justice Gellinoff had previously granted two separate requests by the prosecution for adjournments [TT at 39 and 126-27], he nevertheless refused to grant even a brief adjournment for Martinez at this critical juncture. Shortly thereafter the attorney in question, a Mr. R. Franklin Brown, appeared before the Court to represent Martinez. Justice Gellinoff refused, however, to permit Mr. Brown to enter the case, on the basis that it was too late. [FHT at 116-18].

Petitioner had never been tried before a jury prior to this time. He could barely read, and had some difficulty understanding English. [FHT at 137-39]. Mr. Leopold did not assist in the conduct of any part of the trial. Rather, his role was restricted to explaining to Martinez the legal significance of what was happening, and he did not advise Martinez as to trial tactics, strategy, or anything which could be interpreted as his own participation in the trial. [FHT at 41-46].

As Magistrate Goettel noted in his Report at

5-7 [Pet. App. at 36-38], Martinez' case was significantly prejudiced by his attempt at self-representation, despite attempts by the trial court to assist him. There is no doubt that a trained attorney could have done significantly better. Martinez was not arrested until some six weeks after the event in question, and had a potentially effective defense of mistaken identity. Although he was charged, inter alia, with possession of a dangerous weapon as a felony, the prosecution's case was based only upon constructive possession of a knife. The wielder of that knife, a co-defendant in the case, testified at the trial that Martinez was not present at the scene of the crime, but that two other individuals assisted him. In the end, the jury deliberated for some five and one-half hours, and requested review of portions of the transcript, before bringing in a verdict of guilty on all counts. [TT at 253-60].

B. Martinez' Psychiatric History

Since at least as early as 1951, when he was admitted upon certification to Wassaic State School as a mental defective and undifferentiated moron, Martinez has been confined and treated in a number of mental institutions. [See Pet. Ex. 6(a) through (i); Stip. at 5]. Martinez was certified from Bellevue Hospital to Kings Park State Hospital on November 26, 1954, where he remained until July 7, 1956. He was given psychiatric examinations at

the Eastern Correctional Institution at Napanoch, New York, and at Attica State Prison during the period approximately from 1959 to 1963. [Stip. at 5].

Only one year prior to his arrest for the instant charges of armed robbery, Martinez had been admitted to Bellevue Psychiatric Hospital.* A Psychological Report, prepared at Bellevue at that time, concluded that "An emotionally and severely disturbed individual is indicated as well as a sociopathic character disorder", and that "[a] psychotic character disorder is indicated with marked sociopathic trends. It is felt that when under duress, he might act out quite irresponsibly." [Pet. App. at 198-199]. Six days after his admission to Bellevue, on February 9, 1965, Martinez escaped. One week thereafter, a notice of application for an order adjudging Martinez to be mentally ill was mailed to his address, but he never responded to this notice, despite the urgings of his family. [Pet. Ex. 6(e); Pet. App. at 200; FHT at 140-41].

After his conviction in August, 1966, Martinez

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* Although the District Court stated that Martinez "voluntarily sought treatment of his drug habit", [Op. at 6], the medical records and Martinez' testimony at the federal hearing indicate that he was brought to Bellevue by his brother-in-law after his depressed and violent behavior at home. [FHT at 139-41; Pet. Ex. 6(e); Pet. App. at 197].

was returned to Rikers Island to serve out the remaining portion of his year's sentence, prior to commencing the sentence imposed by Justice Gellinoff. While at Rikers Island, he made several attempts at suicide, swallowing pins on one occasion and razor blades on another. On these occasions and others, he was transferred to Bellevue Psychiatric for observation and treatment. [Pet. Ex. 6(e) and (f); Pet. App. at 201-223; FHT at 142-43].

On February 3, 1967, in an Interdepartmental Memorandum of the New York City Department of Correction, a Dr. Franklin S. Klap diagnosed Martinez as suffering from "schizophrenic reactions, paranoid type". A Psychiatric Consultation Note on his Progress Record at Bellevue Hospital, dated February 21, 1967 and prepared by the Psychiatric Resident, stated that "There is strong possibility pt. is psychotic actually ambulatory psychosis underlying chronic S.R." A Bellevue Hospital Continuation Record dated April 10, 1967 lists as an "impression" of Martinez: "Reactive Depression; Sociopathic Personality". [Pet. Ex. 6(e) and (f); Pet. App. at 220, 207-208, and 213, respectively].

Upon expiration of his prior sentence on May 26, 1967, Martinez was sent to Sing Sing Prison to commence service of his sentence under Indictment No. 999 of 1966. A Psychiatric Progress Note from Sing Sing Prison dated May 29, 1967, states: "It is felt that inmate is acutely

psychotic and dangerous to himself and others." [Pet. Ex. 6(g); Pet. App. at 225]. The same day, he was transferred to Dannemora State Hospital after a panel of doctors determined that he was suffering from "psychosis with psychopathic personality, schizoid type". [Stip. at 4]. A synopsis of a mental examination of Martinez, dated May 29, 1967 and prepared by the Senior Psychiatrist at Dannemora, reported that "[h]is verbal productivity is about the normal. At times he is spontaneous, relevant and logical, but sometimes during the interview he becomes irrelevant and illogical. Contact with him is fair". [Pet. Ex. 6(g); Pet. App. at 226]. It is also reported that Martinez' general knowledge was below the 9th grade level, and that his judgment was "very poor" [Pet. App. at 228]. Martinez was not certified to have recovered until September 24, 1968. He was again committed to Dannemora State Hospital for treatment of a "depressive neurosis" from July 31, 1970 to December 12, 1970. [Stip. at 4-5].

ARGUMENT

POINT I

THE COURT ERRED IN CONCLUDING THAT MARTINEZ COMPETENTLY AND KNOWINGLY WAIVED HIS RIGHT TO COUNSEL

The Sixth Amendment requires either the assistance of counsel or an effective waiver thereof before an individual can be constitutionally deprived of his liberty. Johnson v. Zerbst, 304 U.S. 458, 462-3 (1938); Von Moltke v. Gillies, 332 U.S. 708 (1948); Mitchell v. United States, 482 F.2d 289 (5th Cir. 1973). This fundamental principle is equally applicable to state as well as federal proceedings, through the operation of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). The record in the instant case reveals that Martinez did not waive right to the effective assistance of counsel, and that he was mentally incompetent to do so.

A. There Was No "Affirmative Acquiescence" Sufficient to Constitute Waiver

To constitute a valid waiver, the record must reveal a defendant's "affirmative acquiescence" in the relinquishment of his constitutional right to counsel:

> "The record must show, or there must be an allegation and evidence which show, that an accused was

> offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." Carnley v. Cochran, 369 U.S. 506, 516-517 (1962).

Put otherwise by Mr. Justice Frankfurter in Von Moltke v. Gillies, supra, 332 U.S. at 729 (concurring opinion): "[t]here must be both the capacity to make an understanding choice and an absence of subverting factors so that the choice is clearly free and responsible."

The District Court apparently assumed, without specifically determining, that Martinez' declaration in the course of the trial that he would represent himself rather than accept the representation of Mr. Leopold constituted a waiver of his right to counsel. [See Op. at 15, 16, 18, 24; Pet. App. at 17, 18, 20, 26]. However, as discussed supra at 9-13, the trial record indicates that Martinez' declaration was made under duress, after Justice Gellinoff had refused to grant him a continuance to obtain private counsel, and had directed that he proceed to trial with assigned counsel who had admitted that he was unprepared. [TT at 2-13; Pet. App. at 84-95]. At this point, Martinez had only met Leopold on two occasions, and had learned for the first time the prior day that he was scheduled to go to trial on August 4, 1966. Martinez made it very clear throughout the proceedings that he did not in fact wish to represent himself, but urgently desired the services of a private attorney instead.

Martinez' refusal to continue to trial under these circumstances with unprepared counsel cannot be considered to constitute a waiver of his constitutional right to counsel. See United States v. Morrissey, 461 F.2d 666 (2d Cir. 1972); Sawicki v. Johnson, 475 F.2d 183 (6th Cir. 1973). Given the failure of the trial judge to make any inquiry, either with respect to Martinez' understanding of the consequences of his declaration, or with respect to his reasons for his request, it is respectfully submitted that the record fails to demonstrate that Martinez "affirmatively acquiesced" in waiving his right to counsel, and that the District Court erred in assuming his declaration amounted to an effective waiver.

B. Martinez Was Incompetent To Waive His Right to Counsel

The trial record, moreover, must reveal more than "affirmative acquiescence" in the waiver of counsel: To be valid, a proffered waiver of an individual's right to counsel must be "intelligent and competent". Johnson v. Zerbst, supra, 304 U.S. at 465. "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id. at 464.

The standard to be utilized in evaluating an accused's competency to waive his right to the assistance of counsel is higher than that to be utilized in determining his competency to stand trial. Westbrook v. Arizona, 384 U.S. 150 (1966). Thus the Ninth Circuit has held that ". . . the degree of competency required to waive a constitutional right is that degree which enables [an accused] to make decisions of very serious import", such that, if his ability to make a reasoned choice is substantially impaired, he is not competent to waive his right to counsel. Sieling v. Eyman, 478 F.2d 211, 214-5 (9th Cir. 1973). See also United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964) ("capacity to make an intelligent choice"); Rees v. Peyton, 384 U.S. 312, 314 (1966); Note, "Competence to Plead Guilty: A New Standard", 1974 Duke Law Journal 149, 168 (1974).

The District Court determined that Martinez "had the capacity to make an intelligent choice" and that "he was competent to waive counsel". [Op. at 24; Pet. App. at 26]. This determination was based primarily on the following: (1) the Court's analysis of Martinez' medical and psychiatric records; (2) its characterization of the testimony of Dr. Gorlicki at the state coram nobis hearing; and (3) its reading of the trial transcript and the recollected

observations of Mr. Leopold and Justice Gellinoff adduced at the federal hearing. It is respectfully submitted that the evidence cited by the Court does not in fact support its determination, but rather contradicts it at critical points. Moreover, nowhere does the Court consider the testimony of Dr. Augustus Kinzel, an expert psychiatrist called by Martinez at the federal hearing.

1. The District Court's Analysis of Martinez' Medical Records. The Court, in making its analysis, first reviewed Martinez' medical records, which it found to be "extensive but inconclusive and even conflicting on the issue of petitioner's probable competence to waive counsel and represent himself in 1966". [Op. at 4; Pet. App. at 6]. Nevertheless, those records reveal numerous institutionalizations of Martinez, commencing in childhood and extending beyond the date of trial, for serious mental and emotional disorders. The existence of several reports in the course of these various commitments to the effect that Martinez was "recovered" or "not psychotic at this time"--including two single-page analyses of Martinez at the Eastern Correctional Institution at Napanoch and from Attica State Prison in 1960 and 1961, respectively -- do not detract significantly from the overall medical history of this petitioner.

More importantly, the District Court gives short

shrift to Martinez' most relevant psychiatric records, reflecting his commitment and treatment at different institutions within a year preceding and following his trial in 1966.* Thus the Court, while noting that Martinez was treated at Bellevue in February, 1965 and that he was diagnosed as suffering from "a psychotic character disorder", does not comment upon the application for an order adjudging Martinez to be mentally ill which was issued following his escape from Bellevue on February 9, 1965. Moreover, the District Court, in summarizing Martinez' medical history post trial, characterized that history in the following manner: "Further examinations . . . led to conflicting impressions or diagnoses, some finding psychosis and some not." [Op. at 6; Pet. App. at 8]. While the Court cites a "Diagnostic Impression" obtained after an interview of Martinez in Rikers Island after an escape attempt, it does not comment upon the fact that Martinez' escape consisted of his leaping into the frigid waters surrounding Rikers Island on the previous day, December 25, 1966. Nor does the Court comment upon or otherwise note Martinez' suicide attempts within four months of his sentencing while confined to Rikers Island, and the other diagnoses at Rikers Island and Bellevue cited

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* These records [Pet. Ex. 6(e), 6(f), and 6(g)], are set forth at pages 193-245 of Petitioner's Appendix.

supra at 17-20. Finally, Martinez' commitment to Dannemora State Hospital after being diagnosed by a panel of psychiatrists as suffering from psychosis three days after his arrival at Sing Sing Prison on May 27, 1966, is evidence of more than merely "conflicting impressions or diagnoses". Although Martinez was confined at Dannemora for more than one year after his commitment, the District Court makes no mention whatsoever of this commitment or of the results of the examinations related to it.

2. The Testimony of Dr. Gorlicki at the State Coram Nobis Hearing. The District Court concludes its analysis of Martinez' medical records by stating:

> "Without setting forth more detail, suffice it to say that the medical records tend to support the testimony of Dr. Gorlicki at the state coram nobis hearing that Martinez is a person who has periods of normalcy, times when he does not suffer from any mental defect and thus can understand trial procedures, as well as times when he would be in a psychotic or schizoid state." [Op. at 7; Pet. App. at 9].

Even assuming that Martinez' medical records could be read to support the proposition that he had periods of "normalcy" such that he could "understand trial procedures" (although this is not the proper standard for assessing the competence of a waiver), it is respectfully submitted that Dr. Gorlicki's testimony at the state coram nobis hearing was to the con-

trary.*

The basis for the Court's conclusion is the following exchange, which occurred on cross examination of Dr. Gorlicki:

> "Q. And this is the type of person that has periods where he can conduct himself normally; is that not so, Doctor? A. Yes.
>
> Q. And then there are periods when he becomes sick? A. Yes." [CNT at 78; Pet. App. at 174].

However, on redirect, this testimony was significantly qualified:

> "Q. Now, when we talk about normalcy, what do we mean, Doctor, considering the history of this defendant, the fact that at age twelve he was classified as a moron, with a mental deficiency, and subsequently diagnosed as a psychotic? To

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* Dr. Gorlicki's testimony is set out at pages 52-96 of the Coram Nobis Transcript [Pet. Ex. 2] and at pages 148-192 of Petitioner's Appendix. It should be noted that Magistrate Goettel, in his Report and Recommendation on Habeas Corpus, determined that the coram nobis proceeding should not be accorded a "presumption of correctness" largely because Dr. Gorlicki had not been prepared in advance of his testimony, Martinez' medical records were poorly developed, and the Court intervened excessively in the interrogation (at several times sustaining objections that were not made and at other times badgering the witness). Thus, he concluded, "The petitioner did not receive a full, fair and adequate hearing concerning the degree of his mental impairment." [Report at 9-11; Pet. App. at 40-42]. It was largely for this reason that a federal evidentiary hearing was held. But, as discussed post, while Martinez' medical records were once more assembled and produced, and an expert witness testified at some length at the federal hearing, the District Court inexplicably chose to disregard the testimony of that witness in rendering its findings as to Martinez' competence to represent himself at trial.

what extent was his mind capable of achieving normalcy? A. It's a good question. He probably was never normal in the sense." [CNT at 80; Pet. App. at 176].

Later, on "re-redirect", Dr. Gorlicki further qualified his opinion, in discussing Martinez' discharge from Dannemora State Hospital:

"Q. ...Please explain, and that's all I'm going to ask you, Doctor, what we mean when we say a remission to normalcy in the case of this defendant? A. When we say remission to normalcy, when he was discharged from Dannemora State Hospital as recovered, this means he returned to his previous state of normalcy, to his particular, his particular; I want to emphasize this.

Q. Would this be a state of mental deficiency? A. We were talking about mental illness.

Q. Mental Illness? A. Yes.

Q. So that would be the state of his normalcy, of mental illness; is that correct? A. When he was recovered, he was recovered from this particular episode that he had in Sing Sing Prison. So he returned back to his normal personality functioning, which has never been good, which has always been defective.

Q. Would you say that his normal function, mental function, was one that was a deficient mental state? A. Yes. Defective mental state." [CNT at 95-96; Pet. App. at 191-192].

In the course of his testimony, Dr. Gorlicki also testified that Martinez was "emotionally unstable all his life" [CNT at 63; Pet. App. at 159]; when presented with the transcript of Martinez' outburst at his trial, Gorlicki testified: "I would assume he was not in a state of mind

to defend himself." [CNT at 61-62; Pet. App. at 157-158]. Later on, Gorlicki again confirmed: "I don't think he was competent to represent himself." [CNT at 70; Pet. App. at 166].

3. Martinez' "Demeanor" at Trial and the District Court's Review of the Trial Transcript. After reviewing Martinez' medical records and discussing standards for determining the competency of a waiver of counsel, the District Court then turned, with the following explanation, to the testimony of Mr. Leopold and Justice Gellinoff at the federal hearing and to the trial transcript:

> "Given petitioner's conflicting psychiatric reports or the periodic nature of his disorders, as noted supra, it would appear that petitioner's behavior at the time of the trial as shown by the trial transcript and as interpreted by persons in contact with petitioner during the trial is the best indicator of his competence at that time, as those persons had some opportunity to observe demeanor." [Op. at 22; Pet. App. at 24].

Mr. Leopold testified at the federal hearing, however, that Martinez was "extremely upset, agitated, angry in general, frustrated" when he told Leopold on the day of trial that he no longer wished to have Leopold represent him. [FHT at 28]. In addition, Leopold testified that he was sufficiently concerned by Martinez' "outbursts of loud, emotional, and perhaps close to violent nature" during the course of the trial to recommend at sentencing that he be examined by a

psychiatrist. [FHT at 46; Pet. App. at 49].*

Justice Gellinoff testified that he had only a "slight" recollection of the case [FHT at 85-86], and it is submitted that his recollected observations and testimony with respect to his mental processes were somewhat self-serving. Nor can it be said that either Justice Gellinoff or Mr. Leopold was sufficiently expert in psychiatric diagnosis to render a qualified opinion as to whether Martinez' reasoning capacity was defective or substantially impaired, based upon their recollected observations of him at the trial.

Finally in this regard, the District Court concluded from its own review of the trial transcript that:

> "[e]xcept for petitioner's emotional outburst when he wanted to be allowed to stay at Rikers Island--and through which outburst he was permitted to stay there (TT at 124-28)--and his protests as he sought delays to get his own lawyer (TT at 145), petitioner appears to have been rational and observant throughout the trial." [Op. at 23; Pet. App. at 25].

The relevant portions of the trial transcript, which reflect Martinez' behavior at the trial, are set forth in

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* Elsewhere, the Court asserts that Martinez was "lucid". [See Op. at 9, 18; Pet. App. at 11, 20]. Apart from its reading of the trial transcript, the Court appears to base this conclusion on the testimony of Leopold at the federal hearing, who stated that he could not recollect anything with regard to his preliminary interview with Martinez concerning the latter's competency. [FHT at 37-38; Pet. App. at 46-47].

Petitioner's Appendix at 103-131, and it is respectfully submitted that even this cold transcript does not give the "appearance" of "rational" behavior. Even if it did, the appearance of rationality is not the benchmark: Martinez could appear to be coherent and observant, but nevertheless suffer from such a defect of reasoning that his "capacity to make an intelligent choice" would be substantially impaired. More importantly, the conclusion of the District Court is directly contradicted not only by the testimony of Dr. Gorlicki at the state coram nobis hearing, but also by that of Dr. Augustus F. Kinzel at the federal hearing.

4. The Testimony of Dr. Kinzel at the Federal Hearing. Although the District Court in approving Magistrate Goettel's Report and Recommendation on Habeas Corpus ordered an evidentiary hearing to be held, inter alia, with respect to Martinez' mental capacity before and during trial, it inexplicably ignored the evidence adduced at that hearing on this issue. In the course of the federal hearing, Martinez called as an expert witness Dr. Augustus F. Kinzel, a trained psychiatrist who, prior to taking the stand, had conducted an interview of Martinez and had reviewed his medical records and portions of the trial transcript. [FHT at 57-58; Pet. App. at 52-53].*

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* Dr. Kinzel's testimony is set out at FHT pp. 55-84 and in substantial portion at pages 50-71 of Petitioner's Appendix. His "curriculum vitae", court's Exhibit C, is set out at pages 81-82 of Petitioner's Appendix.

Dr. Kinzel testified that Martinez was suffering from chronic schizophrenia in 1966, and that it was his opinion, which he held with "reasonable medical certainty", that Martinez' reasoning capacity was substantially impaired at the time of trial, that he lacked the capacity to understand the consequences of his actions, that he was incapable of making understanding, knowing and reasoned decisions of significant import throughout the trial, and that he was therefore not competent to conduct his own defense. [FHT at 58-59, 71-72, 75-76; Pet. App. at 53-54, 58-59, 62-63]. As Dr. Kinzel testified, chronic schizophrenia is a mental disease which follows a recognizable course of development from its usual onset in adolescence: it is a "chronic psychosis", characterized in part by "being out of touch with reality, not being able to accurately assess what is going on around one." [FHT at 59; Pet. App. at 54].

On cross examination, Dr. Kinzel also stated:

> "My impression is that he has been chronically schizophrenic and rather severely so, that he has not had a relapsing kind of--type of the illness. I think he has had the illness with him pretty much since he was 11 years old." [FHT at 74; Pet. App. at 61].*

Dr. Kinzel explained that chronic schizophrenia is a mental

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* This testimony also directly contradicts the Court's finding, discussed supra, that Martinez experienced "periods of normalcy" when he could defend himself competently.

disease which follows a recognizable course of development: his diagnosis of Martinez' mental state as of 1966 was facilitated by the "indications on records of his illness prior and post", such that "I feel with reasonable medical certainty I can say it existed at the time." [FHT at 62, 75; Pet. App. at 57, 62].*

Counsel for respondent was unable to qualify or otherwise diminish the significance of Dr. Kinzel's testimony at the federal hearing; nor did he choose to introduce any expert witnesses of his own. Given the uncontradicted testimony of Dr. Kinzel, supported in large measure by the prior testimony of Dr. Gorlicki at the state coram nobis hearing and based upon Martinez' extensive psychiatric records, it is respectfully submitted that the District Court's determination that Martinez was competent to waive his right to counsel was "clearly erroneous".

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* The only reference the Court makes to Dr. Kinzel's testimony in its Opinion is to be found in footnote 10 at page 7 [Pet. App. at 9]. In that footnote, the Court construes Dr. Kinzel's admission on cross examination that "a chronic schizophrenic is not necessarily incompetent to stand trial" for the proposition that "even by his description of petitioner's condition, petitioner's psychiatric records would not by themselves indicate whether petitioner was competent to waive counsel and represent himself." [Emphasis added]. This non sequitur misses the entire thrust of Dr. Kinzel's testimony.

POINT II

THE COURT ERRED IN CONCLUDING THAT THE FAILURE OF THE TRIAL COURT TO INQUIRE INTO MARTINEZ' CAPACITY TO WAIVE HIS RIGHT TO COUNSEL WAS CONSTITUTIONAL

The Sixth Amendment imposes upon a court the obligation to protect an accused's constitutional right to counsel. This obligation in turn gives rise to a corresponding duty of the court, before accepting a proffered waiver, to make a full and fair inquiry into an individual's background and situation in order to determine whether that individual understands his right to counsel and is competent to waive it. As the Supreme Court long ago recognized:

> "'This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.'. . . To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. . . . A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." Von Moltke v. Gillies, supra, 332 U.S. at 723-4, citing Johnson v. Zerbst, supra, 304 U.S. at 464.

See also Westbrook v. Arizona, supra; United States v. Ross, 503 F.2d 940, 945 (5th Cir. 1974) ("Particularly crucial is the role of the trial judge, whose penetrating interrogation and careful explanation can assure that the waiver of the

right to counsel by the defendant is made with a full understanding of its ramifications").

The failure of the court to inquire into a defendant's understanding as to his right to counsel and his competence to proceed pro se will result in a reversal of conviction if it later appears that an accused might not have intelligently and knowingly waived his right to counsel. United States ex rel. Higgins v. Fay, 364 F.2d 219 (2d Cir. 1966); United States ex rel. Brown v. Fay, 242 F. Supp. 273, 277-79 (S.D.N.Y. 1965); Nielsen v. Turner, 287 F. Supp. 116 (D. Utah 1968); Rhay v. White, 385 F.2d 883 (9th Cir. 1967); In re Lawrence S., 29 N.Y. 2d 206 (1971) (Fuld, Ch. J.). As Judge Weinfeld stated in United States ex rel. Brown v. Fay, supra, 242 F. Supp. at 278:

> "To intelligently and understandingly effect a waiver of one's right to counsel involves a reasoned judgment and a deliberate choice based upon adequate knowledge of what that fundamental right encompasses. This underscores the responsibility upon the Trial Court to make meaningful inquiry to insure an accused is advised of and fully understands the nature of his right, and further that he is competent to make an informed decision. This duty is not met, without more, by perfunctory statements and routine inquiry. . . ."

See also United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964). The duty to make such inquiry was all the more compelling where, as here, assigned counsel informed the Court that he was unprepared.

The District Court at page 11 of its Opinion [Pet. App. at 13] determined that Justice Gellinoff "did not specifically inquire into the reasons for petitioner's desire to represent himself or into petitioner's background concerning his competency to represent himself." In fact, as the trial transcript demonstrates, at no point did Justice Gellinoff inform Martinez of his right to counsel, warn him of the pitfalls of proceeding alone, or inquire whether he understood the consequences of his waiver or whether he was competent to represent himself. [See TT at 2-18; Pet. App. at 84-100].

However, the District Court seems to have equated "inquiry" with "independent hearing", and to have assumed that a trial court has a duty to inquire into an individual's competence only if there is "sufficient evidence to mandate an inquiry." [Op. at 15; Pet. App. at 17]. It asserted:

> "...the Supreme Court has required that the trial judge make a determination of the defendant's competency at the time the waiver is made and has urged, but not made a constitutional requirement, that such a determination be on the record. It is clear that as part of that determination, a trial judge must order an inquiry specifically into the issue of a defendant's competency to waive counsel if the defendant's competency is otherwise brought into question." (Emphasis in original). [Op. at 16-17; Pet. App. at 18-19].

It is respectfully submitted that this confuses the obligation of a trial judge to preliminarily inquire into an accused's competence with the obligation to order a further

inquiry via an independent hearing when evidence of the accused's mental state is presented, as required by Drope v. State of Missouri, --U.S.--, 43 L. Ed. 2d 103, 114 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Westbrook v. Arizona, supra.

Although, as argued post, there were sufficient indications in the course of trial and at sentencing to require such further inquiry, the critical point here is that the trial judge made no inquiry whatsoever before allegedly "determining" that Martinez was competent to waive his right to counsel.* Such a determination, made without facts or evidence elicited by inquiry, cannot be considered "adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial". Drope v. State of Missouri, supra, 43 L. Ed. 2d at 113. As Magistrate Goettel noted,

> "[w]hile it is true that the court would not usually have reason to question the competency of a defendant, unless defendant's counsel brings to the attention of the court facts giving rise to such a possibility, it is difficult to see how this can be accomplished if the defendant is representing himself." [Report at 8; Pet. App. at 39].

It is for this very reason that appellate courts have imposed the requirement that there be an initial colloquy between judge and defendant, prior to the acceptance of a

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* Even this "determination" cannot be found in the record (although the District Court assumed it was made).

waiver, which establishes on the record that the defendant understood his constitutional rights, desired to waive them, and was competent to execute a valid waiver.* The District Court's failure to apply this standard to the instant case represents reversible error.

At least in part because of his failure to inquire, Justice Gellinoff was never fully apprised of Martinez' mental condition. Had the latter's assigned counsel or the Legal Aid Society investigated his case further, they might have discovered his long history of mental illness. Yet Mr. Leopold was unprepared for trial when Martinez' case was called. Nevertheless, there were sufficient indications in the course of the trial and at the sentencing which should have alerted Justice Gellinoff to the possibility that Martinez was incompetent to represent himself, and which further underscore the trial judge's failure to make any inquiry as to Martinez' competence.

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* Indeed, in Boykin v. Alabama, 395 U.S. 238, 242 (1969), the Supreme Court reversed a conviction entered after a plea of guilty solely on the basis that "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." This Court has recently deferred deciding whether the mere failure of a trial court to pose specific questions with respect to waiver of an accused's Fifth and Sixth Amendment rights is unconstitutional--regardless of the accused's mental competence to execute such waiver. United States ex rel. Hill v. Ternullo, Slip Op. No. 526 at 1756 n.1. (2d Cir. February 10, 1975).

The trial transcript reveals a number of agitated exchanges between Martinez and Justice Gellinoff, which the latter apparently regarded merely as emotional outbursts and therefore discounted. One such outburst is the following:

"COURT CLERK: Bring in the jury?

THE COURT: Yes. Now, I want him kept here.

THE DEFENDANT: Your Honor, what do you want to do that for? Your Honor--listen, you make--what are you trying to do to me?

THE COURT: Now, stop, Mr. Martinez.

THE DEFENDANT: I'm doing time on Rikers Island now. They want me to stay here--I'm set up over there.

THE COURT: Mr. Martinez, this Court--

THE DEFENDANT: Never mind the Court. I'm trying to prove something and you're not letting me. You're using psychology left and right, baby talking me.

COURT CLERK: He's to be kept here--

THE COURT: Yes.

THE DEFENDANT: Listen, you're not sitting in this courtroom no more. We'll see now whether you want to or not, you don't see me here no more. You don't see me here no more. You want to play your games and send me to Matteawan and play your games. He wants to keep me here in this rat hole over here. I'm doing time on Rikers Island, and now he's keeping me here. You think it's going to make me plead guilty by keeping me in this hole?

THE COURT: I wouldn't accept your plea of guilty. I wouldn't permit you to plead guilty." [TT at 124-125; Pet. App. at 123-124].

On other occasions, Martinez exhibited excessive suspiciousness, at one point inquiring (during the jury selection

process) why the jury wheel had not been turned [TT at 64-65; Pet. App. at 108-109] and at another requesting the Court to assure that the complaining witness, the patrolman at the scene of the crime, and the arresting detective not be permitted to speak with one another [TT at 47-48; Pet. App. at 105-106]--signs which Dr. Kinzel considered compatible with Martinez' illness. [FHT at 64-67].

At the time of Martinez' sentencing on October 4, 1966, moreover, the situation was different. Justice Gellinoff had before him a Pre-Sentence Report, prepared by the New York Supreme Court Probation Department. [Pet. Ex. 7; FHT at 111]. It was reported therein that Martinez was assessed in 1959 to be "of borderline intelligence", and that he had twice "been institutionalized in a school for mental defectives and in a mental hospital." [Pet. Ex. 7 at 7]. The Report also noted that Martinez had <u>not</u> been examined by the Court's Psychiatric Clinic "because of his confinement to the Rikers Island Penitentiary". Moreover, the Probation Officer who prepared the Report testified that it had been based on an earlier Pre-Sentence Report dating from 1959, and that he had not been aware of Petitioner's 1965 institutionalization at Bellevue Psychiatric Hospital. [FHT at 124-25].

At the sentencing, Martinez, Mr. Leopold, and yet another lawyer, Mr. Sam Segal, all requested that he be

committed to Bellevue Psychiatric Hospital for observation. [Sentencing Minutes, appended to the Trial Transcript, at 3-9; Pet. App. at 138-144]. To these requests, again without making any inquiry, Justice Gellinoff replied that "[i]nsufficient has been shown to warrant the Court's arriving at the conclusion that there is even a question as to this man's ability to understand the nature of the proceedings or to be able to make his defense." [Sentencing Minutes at 9; Pet. App. at 144].

With respect to the foregoing, the District Court ruled:

> "When weighed with the evidence of petitioner's reasonably rational behavior at trial, this inconclusive, old mental history and the belated arguments of petitioner's partisans did not necessarily raise a reasonable ground for belief of incompetency so as to require further inquiry. . . . At no time, therefore, did the trial judge have a duty under Westbrook to hold a separate hearing or inquiry into petitioner's competence to waive counsel." [Op. at 20; Pet. App. at 22].

This, it is respectfully urged, is an erroneous conclusion based upon application of an incorrect legal standard: there must be some inquiry before there can be "further" inquiry. Even if the trial transcript revealed "reasonably rational behavior", moreover, there were certainly indications of aberrant behavior as well which should have aroused suspicion. Justice Gellinoff was presented only with "old mental history" in the Pre-Sentence Report because the Probation Department had not bothered to send a psychiatrist

out to interview Martinez at Rikers Island (the same reason, no doubt, that Martinez was not interviewed by the Legal Aid Society in the several months between its appointment and his trial). Justice Gellinoff was informed by the Report that no interview had been conducted, and again should have been put on notice that he had insufficient information with respect to Martinez. Finally, to characterize the requests for psychiatric examination as "belated arguments of petitioner's partisans" is surely to overstate the case. Justice Gellinoff, under the foregoing circumstances, was constitutionally obligated to inquire whether Martinez had been mentally competent to waive his right to counsel. This obligation was not discharged.

POINT III

THE COURT ERRED IN CONCLUDING THAT MARTINEZ WAS NOT DEPRIVED OF HIS RIGHT TO COUNSEL BY THE TRIAL COURT'S DENIAL OF A CONTINUANCE TO OBTAIN PRIVATE COUNSEL AND BY THE TRIAL COURT'S REFUSAL TO PERMIT PRIVATE COUNSEL TO PRESENT MARTINEZ' DEFENSE

The trial judge's failure to inquire diligently into Martinez' background and capacity to represent himself was made all the more critical by his denial of Martinez' request for a continuance so that he could obtain private counsel. Although the right to counsel cannot be utilized to delay or impede the administration of justice, United

States v. Morrissey, 461 F.2d 666 (2d Cir. 1972), it is equally sound teaching that the Sixth Amendment assures an individual the right to the assistance of counsel of his own choosing. Chandler v. Fretag, 348 U.S. 3, 9-10 (1954); United States v. Hayman, 342 U.S. 205 (1952). The District Court, however, determined that Martinez "had a reasonable time to retain counsel", and that "it was well within the court's discretion to deny another request for an adjournment to retain new counsel." [Op. at 26; Pet. App. at 28].

This determination overlooks Martinez' testimony that the first time he learned that he would go to trial on August 4, 1966 was the prior day, in the course of a calendar call before Justice Brust. [FHT at 152]. Martinez was at the time confined to Rikers Island, where he was serving out a prior year's sentence of imprisonment. Although he had made efforts, via his mother, during the time of his confinement at Rikers Island to obtain private counsel, he was beset by singular difficulties because of his relative inaccessability and because of his mother's inability to speak English. Indeed, Justice Gellinoff testified at the federal hearing that he had "no way" of knowing whether Martinez "had a real reason for wanting to delay the trial". [FHT at 88].

Furthermore, it is well established that representation by inadequate, unprepared, or otherwise ineffective

counsel is constitutionally insufficient. Sawicki v. Johnson, 475 F.2d 183 (6th Cir. 1973); Rastrom v. Robbins, 440 F.2d 1251 (1st Cir.), cert. denied, 404 U.S. 863 (1971); Coles v. Peyton, 389 F.2d 224 (4th Cir.), cert. denied, 393 U.S. 849 (1968); United States ex rel. Thomas v. Zelker, 332 F. Supp. 595 (S.D.N.Y. 1971); McLaughlin v. Royster, 346 F. Supp. 297 (E.D.Va. 1972); United States ex rel. Williams v. Brierley, 291 F. Supp. 912 (E.D. Pa. 1968). Thus, when a request for a continuance to obtain other counsel is made, and there are indications that acting counsel is unprepared or otherwise inadequate, the trial court has an obligation to make further inquiry into the reasons for the request, to protect a defendant's right to the effective assistance of counsel. United States v. Morrissey, 461 F.2d 666, 670 (2d Cir. 1972); Sawicki v. Johnson, supra, 475 F.2d at 184.*

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* The District Court suggests that Leopold's unpreparedness was not the reason why Martinez refused his assistance. [Op. at 26; Pet. App. at 28]. At the federal hearing, however, Martinez testified that he did not want Mr. Leopold because "he never showed no concern", and because "[h]e wasn't prepared." [FHT at 184, 186]. Martinez' suspicions about Leopold also seem consistent with Dr. Kinzel's testimony that Martinez had "a profound difficulty in trusting anyone, even those that were trying to help him", [FHT at 58], and that, under emotional stress (such as at trial) his tenuous contact with reality would become further weakened. [FHT at 59]. Martinez informed Leopold he no longer wished to have his representation only after Leopold had failed in his efforts to obtain a continuance: this undoubtedly affected Martinez, for Leopold testified that he looked extremely upset, agitated and frustrated at the time. [FHT at 28].

At the time of trial, Mr. Leopold was far from prepared, having just returend from vacation and having interviewed Martinez only twice in the preceding two and one-half months. The Legal Aid Society investigation was still pending and, as he testified at the federal hearing, Mr. Leopold believed that "the case was not in any posture to be tried". [FHT at 35]. Although informed at the outset that Mr. Leopold was unprepared and that Martinez desired to obtain the services of private counsel, Justice Gellinoff made no inquiry but instead directed that the trial commence immediately. Martinez was given no opportunity to explain the dismissal of his formerly retained counsel, nor the fact that many of the calendar calls in his case had been adjourned either at the request of the prosecution or because of the failure of the Legal Aid Society to appear.

The District Court apparently discounted the foregoing by finding that "Martinez certainly contributed to his counsel's lack of preparedness", citing Martinez' failure to give Leopold "even the first names of possible witnesses until the eve of trial" and his declaration at the coram nobis hearing that he did not intend to work with Leopold.* [Op. at 27; Pet.

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* The Court also stated at page 8 of its Opinion that "[t]he apparently mediocre preparation of petitioner's defense prior to trial was due to a number of factors, not the least significant of which was petitioner's own lack of cooperation with and repeated changing of his attorneys." The only indication of such "lack of cooperation" was Martinez' refusal in the course of the preliminary interview with Mr. Leopold to provide him with the names of his witnesses. There is no evidence in the record that Martinez was uncooperative with either of his previously retained attorneys, whom he hired solely to get out on bail, and whom he discharged when they rendered unsatisfactory services at too high a price.

App. at 29]. Although the Legal Aid files indicated that Martinez had refused to provide Leopold with the names of his alibi witnesses in the course of the first interview, Mr. Leopold testified at the federal hearing that this preliminary interview was conducted "without a serious involved discussion of the facts", because "[t]he facilities were pretty poor for in depth discussions at that point." [FHT at 12]. After the initial interview Martinez only saw Mr. Leopold again upon the eve of trial; at that time, he gave him the names of his alibi witnesses--but as he testified, he only knew them by their first names or nicknames. [FHT at 151]. Even if Martinez did "contribute" in part to counsel's unpreparedness, this surely cannot excuse the trial judge's failure to inquire into the circumstances under which an extension was requested.

The District Court also concluded that the trial judge's refusal to permit privately retained counsel, Mr. R. Franklin Brown, to enter the case before the presentation of Martinez' defense was supported by "ample administrative reasons" [Op. at 27; Pet. App. at 29], although the trial conducted up to that point was certainly not a model of sound judicial administration. See pages 14-16, supra. There was no valid reason for refusing to permit Mr. Brown to enter the case, and that his appearance in the course of the trial, on a retainer, provides further evidence of Martinez' good

faith attempts to locate private counsel to represent him.

Under all of the circumstances described above, it is urged that the District Court erred in failing to determine that Justice Gellinoff abridged Martinez' Sixth and Fourteenth Amendment rights by refusing to grant a continuance or to permit private counsel to present his defense. See United States ex rel. Cole v. Follette, 301 F. Supp. 1137 (S.D.N.Y. 1969), aff'd., 421 F.2d 952 (2d Cir. 1970); United States ex rel. Davis v. McMann, 386 F.2d 611 (2d Cir. 1967), cert. denied, 390 U.S. 958 (1968).

CONCLUSION

Regardless of whether the trial judge's refusal of Martinez' request for a continuance to obtain the services of counsel was itself sufficiently arbitrary to amount to a denial of due process, the combination of the refusal and Martinez' mental condition lead to the conclusion that he was deprived of his fundamental constitutional rights. Martinez should not have been presented in the first place with the forced choice of going to trial with unprepared counsel or pro se, without further opportunity to seek the assistance of private counsel. Given his mental condition, he was incapable of making such a choice competently, once it was presented. At trial, he was increasingly incompetent

to present his own defense. The inevitable result was to prejudice the outcome of his trial. Had the trial court made any inquiry into the reasons for the request for a continuance, or into Martinez' competency to represent himself, the trial might not have gone forward that day.

In its Opinion, the District Court failed to consider significant and uncontradicted evidence with respect to Martinez' competence, misconstrued other records and testimony, and apparently applied incorrect legal standards in reaching its result. For the foregoing reasons, it is respectfully submitted that the District Court's determinations that Martinez waived counsel, was competent to do so, and was not deprived of his constitutional rights under the Sixth and Fourteenth Amendments, are in error and should be reversed. Martinez' petition for a writ of habeus corpus should be granted without remanding the case to the District Court, since this Court is in as good a position as the lower court to assess the essentially documentary (and largely uncontradicted) evidence comprising the record on appeal.

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Dated: New York, New York
June 4, 1975

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

Plaintiff

against

Defendant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK ***ss.:***

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 651 Vanderbilt Street, Brooklyn, New York 11218

That on June 4, ***1975*** ***deponent served the annexed*** petitioner-appellant's brief

on Ralph L. McMurry, Esq., Assistant Attorney General for the ~~attorney(s) for~~ State of New York ***in this action at*** #2 World Trade Center, Rm. 4501, New York, N.Y. 10047 ***the address designated by said attorney(s) for that purpose by depositing*** ~~a true copy of same enclosed~~ two true copies ***in a postpaid properly addressed wrapper, in*** ~~a post office~~ ***official depository under the exclusive care and custody of the United States Postal Service within the State of New York.***

Sworn to before me this
4th day of June, 1975.

Joan Ann Annicaro

JOAN ANN ANNICARO
NOTARY PUBLIC, State of New York
No. 52-0128463
Qualified in Suffolk County
Certificate filed in New York County
Term Expires March 30, 1977

Joseph H. Schnabel

The name signed must be printed beneath

JOSEPH H. SCHNABEL

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on 19 *deponent served the annexed*

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law